DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36

COMMENTS OF
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Francine J. Berry
R. Steven Davis
Roy E. Hoffinger

Its Attorneys

295 North Maple Avenue
Room 3244J1
Basking Ridge, New Jersey 07920

March 29, 1993

0+4

TABLE OF CONTENTS

SUMMARY

The Commission's objective in this proceeding is to "streamline, to the maximum extent possible consistent with [its] statutory obligations, its tariff filing rules for domestic nondominant carriers" (Notice, para. 2). The Notice therefore proposes to allow nondominant carriers to file only maximum rates or ranges of rates, to choose the form of their tariffs, and to file tariff revisions on one

eliminate rules governing the form of tariffs and to reduce the notice period, the arbitrary limitation of this relief to AT&T's competitors is unsupported and unsupportable. Competition throughout the interexchange market is, as the Commission recognizes, "thriving" and "robust." Customers have numerous alternatives available to them from a variety of carriers, and readily act upon those choices: millions of residential customers, for example, change carriers each year. There is thus no legitimate reason to impose on AT&T and its customers the delays and disincentives that the Notice seeks to eliminate. The Commission should therefore extend maximum streamlined regulation to all services offered by all interexchange carriers, including AT&T.

At a minimum, the Commission should extend such streamlining to AT&T's outbound and inbound business services, including AT&T's Tariff 12 and contract tariff offerings. The Commission has previously determined that it should apply to these services the same tariffing rules and notice periods applicable to the tariffs of its competitors. The Commission's proposal to limit to AT&T's competitors further relief from these requirements is an unjustified step backward, and would benefit only AT&T's competitors at the expense of consumers.

The Notice also proposes to permit nondominant carriers to file only "maximum" rates or "ranges" of rates. In contrast to its proposals concerning notice periods and form of tariffs, this proposal is foreclosed by the plain

language of Section 203, as confirmed by recent decisions of the Supreme Court and Court of Appeals. Section 203(a) explicitly requires that carriers file all of their charges, and Section 203(c) prohibits the provision of service at unfiled rates. Under the Commission's proposal, however, the net charge to a customer would not be published in or ascertainable from the filing, but would be determined pursuant to secret agreements. This is patently unlawful.

The Commission's "policy finding" that compliance with Section 203 is "unnecessary" is contrary to Congress' directive in the statute, and provides no basis for adopting the proposal in the Notice. Congress has determined that the public has an absolute right to know the rates offered by carriers, to implement the statutory requirement of Section 202(a) that each carrier make any rate and service arrangement available to all "similarly situated" customers on non-discriminatory terms. The statute's anti-discrimination requirement is rendered meaningless unless all the specific charges that are in fact paid by customers

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36

COMMENTS OF
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

American Telephone and Telegraph Company ("AT&T") hereby submits its comments on the Notice of Proposed Rulemaking in CC Docket No. 93-36 ("Notice").[1]

INTRODUCTION

In 1985, the Court of Appeals held that Section 203 plainly requires that "[e]very" common carrier, including so-called "nondominant" carriers, "shall" publicly file and adhere to their charges for interstate telecommunications services, and that the Commission "lacks authority" to exempt carriers from these statutory

---

1 Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, FCC 93-103, released February 19, 1993.

requirements. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1188, 1191 (1985) ("MCI v. FCC").

In Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)("Maislin"), the Supreme Court reached the same result under the rate filing provisions of the Interstate Commerce Act, which are the model for Section 203. It held that those provisions absolutely prohibit the "secret negotiation and collection of rates lower than the filed rate" (id. at 117), and that regulatory authorities may not "sanction adherence to unfiled rates" or "render[] nugatory" the requirement that carriers publicly file all of their charges and adhere to those charges.

In AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), the Court of Appeals held that MCI's practice of providing telecommunications service to customers at unfiled rates violates Section 203. The Court reaffirmed that Section 203 requires carriers to charge only filed rates, and that

forbearance and plainly inconsistent with the requirements of Section 203, which the Commission may not abrogate regardless of any "policy findings" or other factors.

The Notice also proposes to allow nondominant carriers, including all interexchange carriers other than AT&T, to determine the form of their tariffs, and to file tariff revisions on one day's notice. In contrast to the content of tariffs, the Commission has substantial discretion regarding the form of tariffs and notice periods. As shown below in Part II, however, what the Commission should not do is limit its proposals arbitrarily to AT&T's competitors. The same competitive forces that the Commission tentatively concludes warrant relief for other carriers from regulatory rules governing form of tariffs and notice periods apply to AT&T's services as well. Accordingly, the Commission's proposals should be adopted for all interexchange carriers, including AT&T.

I. THE COMMISSION'S PROPOSAL TO PERMIT CARRIERS TO FILE ONLY RANGES OF RATES AND MAXIMUM RATES IS PATENTLY UNLAWFUL

The Notice proposes a new rule that would purportedly allow carriers to file tariffs that contain maximum rates or ranges of rates, but that do not specify the actual charges to the customer or a formula for determining those charges. This rule is contrary to the plain language of Section 203, and invalid under MCI v. FCC and AT&T v. FCC, and decisions construing the identically worded language of

the statute that was the model for Section 203, including Maislin and Regular Common Carrier Conference v. United States.[2]

A. The Commission's Proposal is Deficient Because Net Charges Would Not Be Ascertainable From A Carrier's Filed Schedules

By its terms, Section 203 requires that "[e]very common carrier . . . shall file with the Commission and print and keep open for public inspection schedules showing all charges for itself . . . and showing the classifications, practices and regulations affecting such charges." 47 U.S.C. § 203(a)(emphasis added). When a carrier files "all" of its charges, and all "classifications, practices and regulations" affecting such charges, the result is that the carrier's "actual charges" to the customer are "specified" in public filings. Section 203(c) further provides that "[n]o [common] carrier shall . . . charge, demand, collect or receive a greater or less or different compensation for such communication . . . than the charges specified in the schedule then in effect, . . . or employ or enforce any classifications, regulations or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c)(emphasis added).

The Commission itself has held that Section 203 requires that rates be stated in tariffs with "clarity, specificity and certainty."[3] According to the Commission, "it is clear" that Section 203 "prohibits a net charge which is different than that shown in the tariff."[4] The purpose of the statute "is to prevent a carrier from making special off-tariff deals with certain customers."[5] As the Supreme Court explained in Maislin:

> "If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. . . .[The Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the desire of the statute to prohibit and punish."[6]

---

3 Annual 1987 Access Tariff Filings, 2 FCC Rcd. 866, 879

The Commission's proposal would purport to authorize the very conduct that the statute forbids. It contemplates that a carrier would file only a "maximum" rate

The Commission's proposal contradicts the requirement of Section 203(a) that carriers publicly file "all" of their charges, and all classifications, practices and regulations affecting charges, and would likewise nullify the requirement of Section 203(c) that carriers collect only "charges specified" in their tariffs. Because it purports to authorize carriers to provide customers with secret, unfiled discounts, the Commission's proposal contradicts its construction of Section 203, as well as the statute's text.[8]

If there were any doubt that the filing of only a maximum rate or a range of rates in lieu of the information specified in 203 is unlawful (which there is not), it is completely eliminated by Regular Common Carrier Conference and its progeny. Regular Common Carrier Conference holds that charges for common carrier services must be "published in" or "readily ascertainable" from the carrier's filings

---

[8] Compare MTS and WATS Market Structure, para. 34 ("end user credits do not constitute an unlawful refund or rebate pursuant to Section 203 . . . since the credit will be set out in the local exchange carrier's tariff") and MCI Telecommunications Corp., 53 F.C.C.2d 572, 574 (1975) ("[t]here is no rebate or remission here, since the [1.25 percent prepayment] credit in question is part of the tariff rate and is a condition under which service is secured") with ITT World Communications v. TRT Telecommunications Corp., 51 R.R.2d 1386, 1391 (1982) (equipment "discounts or giveaways" provided by a carrier to customers on condition that they purchase and use the carrier's telecommunications service violate Section 203(c) "because [their] effect is to reduce the customer's total transmission charges by the amount of the free or reduced rate of terminal equipment").

with the agency, and that any tariff that does not meet this standard, but instead leaves the rate in question open for

discounts would apply to a given shipment."[10] The ICC has also rejected range tariffs, reasoning that "a tariff is not acceptable unless it allows competing carriers to know the applicable rate or how a per-unit rate is determined, and allows shippers to compute the precise per unit rate to which they are entitled."[11] In another case, the ICC rejected a proposed tariff providing for discounts "up to 10 percent" because the actual discount was "subject to negotiation," "unobtainable from the tariff" and therefore unlawful.[12] The reasoning and result in these cases is equally applicable to the Commission's proposal.[13]

---

[10] Discount Coupons, No. 85-1310, slip op. at 3 (ICC July 30, 1985) ("Discount Coupons". Copies of the ICC opinions cited herein are attached as Appendix A.

[11] Roadway Express, Inc. v. Consolidated Freightways Corp. of Delaware, No. MC-C-10975, slip op. at 3 (ICC Dec. 3, 1987); see also Special Tariff Authority No. 84-500, Negotiated Discounts, ANR Freight System, slip op. (ICC April 18, 1985) (rejecting application for carrier to file "discounts ranging from a minimum of 13 percent to a maximum of 38 percent, without publishing the actual discounts in between"), cited in Discount Coupons, supra slip op. at 3.

[12] Haddad Transportation, No. 85-2375, slip op. at 1, 3 n.4 (ICC Sept. 19, 1985).

[13] Tariffs filed by Sprint and MCI illustrate the legal deficiencies of the Commission's proposal. Sprint's tariffs specify a maximum rate, but state that Sprint will negotiate with selected individual customers to provide discounts and promotions off its tariff rates of "up to 10 percent or greater" (i.e., 0-100 percent). See, e.g., Sprint Tariff F.C.C. No. [illegible]

B. The Commission's Policy Findings Are Not Relevant to the Lawfulness of its Proposal, and Are In All Events Misplaced.

The Notice suggests that compliance by nondominant

their tariffs, and as confirmed by AT&T v. MCI and Maislin, it could not be clearer that the Commission may not abrogate this statutory command, regardless of any "policy findings."[14]

In all events, the Commission's "policy findings" are as inexplicable as they are legally irrelevant. The requirement that all rates (and all regulations affecting rates) be published is not a mere legal technicality, as the

[14] Any "rule" that purported to authorize carriers to provide service at rates that are not specified in public filings would not only be invalid, but also could expose customers who relied on such a rule to claims that they are liable for the difference between their carrier's filed rate and the secret rate assessed under an unfiled agreement. See Maislin. To avoid the possibility that customers will be subject to such undercharge claims, the Senate Appropriations Committee has instructed the Interstate Commerce Commission to search for and eliminate "range" tariffs like those proposed in the Notice. S. Rep. No. 578, 102d Cong., 2d Sess., at 187-88. The same concerns are applicable to telecommunications customers. Indeed, MCI has repeatedly (and successfully) defended itself against suits by dissatisfied customers who claim that they were promised

Notice suggests, but is the mechanism through which the other substantive safeguards of Title II of the Act are made enforceable.[15]

The rate-filing requirements are intended, among other things, to implement the statutory requirement of Section 202(a) that each carrier make any rate and service arrangement available to all "similarly situated customers" on non-discriminatory terms. Filing and publication of the information required by Section 203 are the means chosen by Congress to achieve this result. Reliance on other methods or factors was deemed too "uncertain." As the Supreme Court explained:

> "It is said that if the carrier saw fit to change the published rate by [unfiled] contract, the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods."[16]

---

[15] As the Court explained in Regular Common Carrier Conference: "Compliance with [rate filing requirements] is 'utterly central' to the administration of the [Interstate Commerce] Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates." 793 F.2d at 379; accord, Maislin, 497 U.S. at 132.

[16] Armour Packing, 209 U.S. at 81. See also AT&T Communications, Inc. Tariff F.C.C. No. 15 Competitive Pricing Plans, Holiday Rate Plan, 5 FCC Rcd. 1821 (1990) (finding that MCI offer to Holiday Corporation did not become available to other customers until MCI, inter alia, "made public" the "terms of its offer"); Alterman Foods, Inc. v. FTC, 497 F.2d 993, 1001 (5th Cir. 1974) (to make an offer generally available, a party "must not

(footnote continued on following page)

The statute's antidiscrimination requirement is rendered meaningless unless all the charges that are in fact paid by customers are published in or at least ascertainable from the filed schedules. Indeed, the Supreme Court has held that it is a per se violation of this discrimination ban as well as a violation of the language of Section 203 to provide service to a customer at secret, unfiled rates.[17]

Finally, the Commission's concerns about the burdens associated with tariff filing requirements are laudable, but misplaced. Nearly all of the costs, delays and disincentives identified in the Notice are not the result of Section 203's filing requirement, but of non-mandatory regulatory rules and procedures such as lengthy advance notice of rate changes, submission of cost support, and inclusion in tariffs of information beyond that necessary to satisfy Section 203(a). In contrast to the filing of the

---

(footnote continued from previous page)

merely be willing, if asked, to make an equivalent deal with other customers, but must take affirmative action to inform them of the availability" of the offer).

[17] Maislin, 497 U.S. at 130 (the negotiation and collection of unfiled rates that are lower than the filed rate constitutes "the very price discrimination that the Act by its terms seeks to prevent").

Moreover, the Commission's proposal renders meaningless other substantive Commission rules, such as the rule prohibiting bundled offerings of regulated services and nonregulated equipment. See, e.g., 47 C.F.R. § 64.702(e).

information specified in Section 203, none of these other rules and procedures are mandated by the Act. The Commission therefore can and should eliminate or modify its rules governing the form of tariffs and notice periods, and apply these reforms to all interexchange carriers, including AT&T.

II. THE COMMISSION CAN AND SHOULD ALLOW ALL INTEREXCHANGE CARRIERS TO DETERMINE THE FORM OF THEIR TARIFFS AND FILE REVISIONS ON ONE DAY'S NOTICE.

The Notice proposes to allow nondominant carriers to determine the form of their tariffs, and to file tariff revisions on one day's notice. With regard to notice periods, the Notice explains (para. 15) that the fourteen day period applicable under the Commission's current rules is "anticompetitive," "delays the benefits customers receive

prescribe a form.[18] Moreover, the statute affirmatively grants the Commission authority to reduce the notice period. Thus, proposals to reduce the notice period and to grant carriers flexibility with regard to the form of their tariffs are well within the Commission's authority.

There is no basis, however, to apply the Commission's proposals to AT&T's competitors, but not to AT&T. As the Commission recognizes, "competition in the interexchange market" is now "robust."[19] This is true of the interexchange market as a whole, and to all services which comprise that market. Indeed, in its IXC Rulemaking Order, the Commission specifically found that "competition in business services is "thriving," and that this competition "extend[s] not only to large business customers, but also to smaller ones."[20] The Commission has also acknowledged that competition likewise exists for

---

[18] The flexibility accorded to carriers with regard to the form of their tariffs, however, cannot relieve them of their obligations to file all of their charges, and all classifications, practices and regulations affecting such charges.

[19] Tariff Filing Requirements for Interstate Common Carriers, 7 FCC Rcd. 8072 (1992), stayed, CC Docket No. 92-13, Order, FCC 92-524, released November 25, 1992.

[20] Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880, 5892, 5900 (1991) ("IXC Rulemaking Order").

residential services,[21] and AT&T has since demonstrated that competition for these services is no less vigorous than that for other services.[22]

There is no legitimate reason to impose on AT&T and its customers the delays and disincentives that the Notice seeks to eliminate. The Commission's findings that competitive forces render "unnecessary" stringent or advance review of the offerings of AT&T's competitors apply no less to AT&T's offerings. For these reasons, limiting the proposals in the Notice to AT&T's competitors and denying AT&T the same flexibility would be arbitrary and capricious, and therefore unlawful,[23] and would benefit only AT&T's

---

[21] Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd. 2627, 2646 (1990); IXC Rulemaking Order, 6 FCC Rcd. at 5908.

[22] Comments of AT&T, Price Cap Performance Review for AT&T, CC Docket No. 92-134, filed Sept. 4, 1992.

[23] The courts have held that regulatory agencies must be consistent in their application of standards to similarly situated carriers. Because AT&T and its interexchange competitors are all subject to vigorous competition, the Commission cannot lawfully adopt the proposals in the Notice for AT&T's competitors and deny AT&T the same treatment. See, e.g., United States v. Undetermined Quantities of an Article of Drug Labeled "Exachol", 716 F. Supp. 787, 795 (S.D.N.Y. 1989)(summarizing case law with respect to the required consistency of action by administrative agencies); Contractors Transport Corp. v. United States, 537 F.2d 1160, 1162 (4th Cir. 1976). Further, the Commission cannot justify the exclusion of AT&T from its proposals as a means to assist AT&T's competitors. See Hawaiian Tel. Co. v. FCC, 498 F.2d 771, 776 (D.C. Cir. 1974).

competitors at the expense of consumers.[24] Extending maximum streamlined regulation to all services offered by interexchange carriers -- including AT&T -- is essential if consumers are to realize the lower prices, innovative offerings and greater efficiencies that are the objectives of the Commission's procompetitive policies.[25]

At a minimum, the Commission should apply its proposals to AT&T's outbound and inbound business services. The Commission has specifically found that "[g]iven the competitiveness of business services," "unlawful tariffs"

---

[24] Indeed, the Bureau recently recognized that the

for such services "should be rare," and that "advance scrutiny of most business AT&T business service tariffs no longer appears necessary to protect the public interest."[26] Indeed, based on these findings, the Commission previously determined that it would apply to AT&T's outbound business services the same tariffing rules and notice periods applicable to the tariffs of its competitors, and would likewise streamline its regulation of AT&T's inbound services upon the advent of 800 number portability.[27] The Commission's proposal to limit to AT&T's competitors further relief from these requirements restores asymmetry that the Commission had eliminated, and is a significant and unjustified step backward.

CONCLUSION

The Commission's proposal to permit carriers to file only maximum rates or ranges of rates, and allow

---

[26] IXC Rulemaking Order, 6 FCC Rcd. at 5894. The Commission found that the lack of 800 number portability warranted advance tariff review of AT&T's inbound services. Apart from the fact that the number portability factor (which applies to all carriers) cannot justify rules that are applied solely to AT&T, this factor is no longer relevant in view of the Commission's requirement that 800 number portability be implemented on May 1, 1993, or twelve days after the pleading cycle in this proceeding is closed.

[27] Id. at 5894, 5905 n.233. In particular, the Commission reduced the notice period for these services to fourteen days, eliminated the application of price cap and cost support rules, and accorded AT&T's tariff filings a presumption of lawfulness. Id. at 5894.

carriers to provide unfiled discounts from their tariff rates to individual customers pursuant to secret agreements is patently unlawful, and should not be adopted. The Commission can and should, however, allow all interexchange carriers to determine the form of their tariffs, and to file tariff revisions on one day's notice.

Respectfully Submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By _____
Francine J. Berry
R. Steven Davis
Roy E. Hoffinger

Its Attorneys

295 North Maple Avenue
Basking Ridge, New Jersey 07920

March 29, 1993

APPENDIX A